IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 22390 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ARASHIBHAI ARJANBHAI KAMALIYA - Petitioner(s)
Versus
LAKHAMANBHAI MANDANBHIA KAMALIYA & 2 - Respondent(s)

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Appearance :
MR PJ KANABAR for Petitioner(s) : 1,
MR PJ VYAS for Respondent(s) : 1, 3,
RULE SERVED BY DS for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

Date : 19/07/2006

ORAL JUDGMENT

1. By instant petition under Article 226/227 of the Constitution of India, the Petitioner seeks to challenge the order dated 25.10.2005 rendered in

Civil Misc. Application 179 of 2004 by the learned Principal District Judge, Junagadh, by which the application filed by Respondent No.1 under Section 192 of the Indian Succession Act ("the Act" for short) came to be allowed and thereby petitioner was directed to deliver peaceful vacant possession of the agricultural lands bearing Survey No. 1242 admeasuring Acre 1-07 Guntha and Survey No. 1249 admeasuring Acre 2-25 Guntha situated at Kodinar town to Respondent Nos.1, 2 and 3.

2. The facts leading to the filing of the present petition in brief are as under.

3. Madanbhai Kanabhai Kamaliya had acquired in his life the following agricultural lands:-

Sr.No.	Survey No.	Acres – Gunthas	
1.	1240	1	16
2.	1242	1	07
3.	1244	1	15
4.	1249	2	25

4. Madanbhai Kanabhai Kamaliya, who had other immovable and movable properties at villate Kodinar, died on 6.12.1992. The deceased Madanbhai Kanabhai's wife Raiben died on 3.5.1996. Deceased Madanbhai Kanabhai had three sons, namely, Kesar Madanbhai, Arjan Madanbhai and Ladhman Madanbhai. The petitioner is the son of Arjanbhai Madanbhai, the Respondent No.2 herein. Kesarbhai Madanbhai died in November 1994 and respondent no.3 herein is one of the

sons of Kesarbhai Madanbhai.

5. According to the Petitioner, in lifetime of Madanbhai Kanabhai, in the year 1984, deceased Kesarbhai Madanbhai and Lakhmanbhai Kanabhai gave the land bearing Survey No. 1240 to the deceased Kesarbhai Madanbhai and the land bearing Survey No. 1244 and other residential house and immovable properties, etc. to Lakhmanbhai Madanbhai, respondent No.1 herein.

6. The entries in the revenue records accordingly have been mutated in favour of the respective parties, i.e, deceased Kesarbhai Madanbhai and Lakhmanbhai Madanbhai, respondent no.1 herein.

7. The petitioner used to serve and take care of the deceased Madanbhai Kanabhai. Deceased Madanbhai Kanabhai executed a will dated 10.8.1989 with respect to his remaining agricultural lands, i.e. Survey Nos. 1242 and 1249 (“the suit land” for short) as aforesaid and as per the said will, deceased Madanbbai Kanabhai decided to give the said lands to the petitioner. The said will was registered with the Sub-Registrar, Kodinar on 10.8.1989. After the death of Madanbhai Kanabhai on 6.12.1992, the petitioner became entitled to hold, use, occupy and possess the land as per the said will.

8. Respondent No.1 herein and the deceased Kesarbhai Madanbhai, however, did not like that the deceased Madanbhai Kanabhai made a will in favour of the present petitioner and, therefore,

the Petitioner's possession of the suit land was sought to be disturbed. The petitioner was, therefore, constrained to file Special Civil Suit No. 19 of 1993 in the Court of the learned Civil Judge (SD) at Amreli against Respondent No.1 and deceased Kesarbhai Madanbhai for a declaration and permanent injunction.

9. The said Suit, however, was transferred to the Civil Court (JD) at Kodinar and renumbered as Regular Civil Suit No. 107 of 1993. The petitioner had also obtained ad interim injunction which was vacated by the Civil Court (JD), Kodinar vide order dated 26.4.1994.

10. Aggrieved thereby, the Petitioner preferred an appeal being Misc. Civil Appeal No. 44 of 1994, which also came to be dismissed vide order dated 24.9.2002 by the learned Joint District Judge, Veraval. The Petitioner, however, was permitted to withdraw the said Suit with a permission to file a fresh Suit against Respondent No.1 and deceased Kesarbhai Madanbhai.

11. The Petitioner therefore preferred Regular Civil Suit No. 111 of 2002 in the Court of learned Civil Judge (JD), Kodinar against Respondent No.1 and 3. The Petitioner had also applied for interim injunction pending the Suit by way of a separate application at exh.5.

12. Respondent Nos. 1 and 3 also applied for injunction against the Petitioner in the said Suit at exh.13.

13. The learned Civil Judge (JD), Kodinar, however,

rejected application exh.5 vide order dated 9.12.2003. Aggrieved thereby the Petitioner has preferred Misc. Civil Appeal No. 4 of 2004 in the Court of learned Joint District Judge at Veraval, which is pending for hearing.

14. While deciding application exh.5, the learned Civil Judge (JD), Kodinar declined to grant injunction in favour of Respondent Nos. 1 and 3 and against the Petitioner with respect to the actual possession of the land in question and vide order dated 9.12.2003 passed on application exh.13, the learned Civil Judge (JD), Kodinar directed the parties not to transfer or alienate the land in question till final disposal of the Suit.

15. According to the Petitioner, so far as the right, title and interest in the suit land is concerned, substantive Suit filed by the petitioner, i.e. Regular Civil Suit No. 111 of 2002 is pending. However, Respondent No.1 preferred an application being Civil Misc. Application No. 179 of 2004 in the Court of the learned District Judge at Junagadh under Section 192 of the Act against the Petitioner and Respondent Nos. 2 and 3.

16. The Petitioner, on service of summons issued by the learned District Judge, Junagadh dated 16.12.2002, submitted his reply to the application filed by Respondent No.1 and contested the application on merits.

17. The learned Principal District Judge, Junagadh,

after hearing the parties, vide order dated 25.10.2006 allowed the application and accordingly directed the Petitioner to deliver peaceful vacant possession of the suit land in question to the Respondents, which has given rise to the present petition at the instance of the original Opponent No.1.

18. This Court has considered the submissions advanced by Mr. P.J.Kanabar, learned advocate of the Petitioner and Mr. P.J.Vyas, learned advocate for Respondent Nos. 1 to 3 and also perused the impugned judgement and the statutory provisions contained under the Act.

19. There is no manner of doubt that so far as the Suit land is concerned, according to the Petitioner, by virtue of the will executed by deceased Madanbhai Kanabhai, he became the absolute owner of the suit land and in this connection, the petitioner has also filed Regular Civil Suit No. 111 of 2002 in the Court of learned Civil Judge (JD), Kodinar, which is still pending for trial. Notwithstanding the above fact, Respondent No.1 has filed application under Section 192 of the Act. As per the provisions contained under Section 192 of the Act (1) If any person dies leaving property, movable or immovable, any person claiming a right by succession thereto, or to any portion thereof, may make application to the District Judge of the district where any part of the property is found or situate for relief,

either after actual possession has been taken by another person, or when forcible means of seizing possession are apprehended. (2) Any agent, relative or near friend, or the Court of Wards in cases within their cognizance, may, in the event of any minor, or any disqualified or absent person being entitled by succession to such property as aforesaid, make the like application for relief. As per Section 205 of the Act, such an application must be made within six months of the death of the proprietor whose property is claimed by right in succession.

20. In the instant case it is not the case of anybody that the Petitioner has taken the possession by forcible means or the Petitioner has evicted the Respondents from the suit land. According to the Petitioner, he has inherited the suit land by virtue of the will and so far as the genuineness of the will is concerned, lis is pending between the parties in the Court of learned Civil Judge (JD), Kodinar in Regular Civil Suit No. 111 of 2002. As per Section 205 of the Act, application should have been made within a period of six months from the date of the death of the proprietor. In the instant case admittedly the proprietor of the suit land had expired on 6.12.1992 and the application was moved on 15.12.2004. Therefore, application is admittedly hopelessly time barred.

21. In view of the discussions made hereinabove, the petitioner has never dispossessed the

Respondents from the suit land. The suit land is in his possession by virtue of the will and the application filed under Section 192 of the Act is time barred, therefore, impugned order does not stand to scrutiny of this Court, which is deserved to be quashed and set aside by allowing this petition.

22. For the foregoing reasons, the petition succeeds, and accordingly it is allowed with no order as to costs. The order dated 25.10.2005 rendered in Civil Misc. Application No. 179 of 2004 by the learned Principal District Judge, Junagadh is hereby quashed and set aside. Rule is made absolute.

23. On the facts and in the circumstances emerging from the record of the case, the learned Civil Judge (JD), Kodinar before whom Regular Civil Suit No. 111 of 2002 filed by the Petitioner against the Respondents herein is pending for final adjudication shall give top priority to the hearing of the Suit and shall conclude the hearing and decide the Suit as early as possible, preferably on or before 30.4.2007 without fail. Since the possession of the suit land, at present, is with the Petitioner, it is directed that the Petitioner shall not transfer, alienate or create any third party interest in the suit land, till the final decision of the Regular Civil Suit No. 111 of 2002.

(A.M.Kapadia,J)

Jayanti*